(3)

NO. 90-1461

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

Mary H Carter, Tahnella Jackson, and Lemore Allen,
Petitioners

v.

South Central Bell,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

J Courtney Wilson
908 FNBC Bldg.
New Orleans, LA 70130
504/581-6621
Attorney for Petitioners,
Mary H Carter,
Tahnella Jackson, and
Lemore Allen

Pel Hughes Printing, Inc., 134 Carondelet St., New Orleans, LA (504) 523-2618

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARY H. CARTER &		
TAHNELLA JACKSON	*	CIVIL ACTION
	*	
VERSUS	*	NUMBER: 85-1861
	*	c/w
SOUTH CENTRAL BELL		
TELEPHONE CO.	*	85-1862
	*	
	*	SECTION: "H" (6)

Consolidated With

LEMORE ALLEN	*	CIVIL ACTION
	*	
VERSUS	*	NUMBER: 86-1240
	*	
SOUTH CENTRAL		
BELL TELEPHONE CO.	*	SECTION: "H" (6)

JUDGMENT

The above consolidated matters came on for trial on a former day, and after hearing the testimony of witnesses, considering the evidence adduced, the record and the law applicable to the cases, the court issued a written Order and Reasons for dismissal of this matter signed September 30, 1988. Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment herein in favor of the Defendant, South Central Bell Telephone Company, and against the Plaintiffs,

MARY H. CARTER, TAHNELLA JACKSON, and **LEMORE ALLEN,** DISMISSING Plaintiffs' Complaints, each party to bear its own costs.

New Orleans, Louisiana, this 30th day of September, 1988.

DATE OF ENTRY
OCT - 3 1988

\s\ Louis Moore, Jr.
LOUIS MOORE, JR.
United States Magistrate

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARY H. CARTER &		
TAHNELLA JACKSON	*	CIVIL ACTION
	*	
VERSUS	*	NUMBER: 85-1861
	*	c/w
SOUTH CENTRAL BELL		
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	*	SECTION: "H" (6)

ORDER AND REASONS

Plaintiffs, **MARY H. CARTER (CARTER)**, and **TAHNELLA JACKSON (JACKSON)**, filed civil actions in Civil District Court for the Parish of Orleans, pursuant to 42 USC 1981, et seq, alleging discrimination in employment on account of race. The matters were removed to the Eastern District of Louisiana on petition of defendant South Central Bell Telephone Company (SCB). On May 24, 1986, **LEMORE ALLEN (ALLEN)** filed a civil action in the Eastern District of Louisiana also alleging discrimination in violation of 42 USC 1981 and 42 USC 2000(e), et seq., (on account of race). **ALLEN** later filed two Amended Complaints to add a claim of unlawful retaliation. The actions were consolidated and all parties consented to proceed before the Magistrate pursuant to 28 USC sec. 636(c).

Trial was held January 12 through January 16, 1987 and on March 9, 1987. The matter was submitted upon receipt of posttrial memoranda. After considering the pleadings, testimony of the witnesses, the documents in evidence, and the law applicable to this case, the court makes the following findings of

face and conclusions of law in accordance with Rule 52 of the Federal Rules of Civil Procedure.

JURISDICTION

This court has jurisdiction of this action under Title VII, 42 USC sec. 2000(e), et seq.; 28 USC sec. 1981; 28 USC sec. 1331; and 28 USC sec. 1343.

a. **CARTER AND JACKSON**

Both **Ms. CARTER** and **Ms. JACKSON** are Black females and they contend that the program developed to reduce SCB's workforce was discriminatorily administered. At the time of the plaintiffs' departure, both worked as engineers on the Westbank, Gretna, Louisiana, under Lester Hopper, a White male, who was the Operations Manager.

As an effort to reduce its workforce, SCB developed the Management Transition and Assistance Plan (MTAP) which consisted of three programs: (1) Voluntary Accelerated Management Attrition Program (VAMAP), (2) Separation in Lieu of Relocation (SILOR), and (3) Layoff Without Pay.

Under VAMAP, an employee would leave the company and receive a lump sun as severance pay. SILOR provided that a employee who was available for reassignment could apply for jobs in other locations in lieu of layoff.

On April 6, 1984, a meeting was held to inform the employees that a surplus had been declared and that the company planned to lose 250 employees in Louisiana, 25 of these from the New Orleans area. No plans for the reduction had yet been formed.

Supervisor Pete Massett, a White male, explained the VAMAP program at a group meeting on April 11, 1984.

CARTER and Barbara Johansen, a White female engineer, were absent from the April 11 meeting. **JACKSON** was present and testified that the group was informed that all employees would be placed on the available for reassignment list and that the VAMAP program would be offered first to the most senior employees. It was also stated that there was no information as to how many employees the company would accept. **JACKSON** was one of the more junior employees and, therefore, did not think the VAMAP would be offered to her. When she was called in by Massett on April 23, 1984 and given a VAMAP form, she asked what happened and was told that the company decided tomake a blanked offer.

CARTER testified that she and Johansen met with Massett and were given essentially the same information as dispersed at the April 11 meeting.

Both **JACKSON** and **CARTER** testified that they were privately told by Massett that the company would accept only 14 VAMAP applications, not 25 as stated in the meetings, and that if they signed up for VAMAP, they would be protected from the other programs. Both made calls to determine how many employees intended to sign up for the VAMAP program. They presented this information to Massett who told them that he also discovered several people who were going to sign up for the VAMAP program. After reaching a total of about 25, both **CARTER** and **JACKSON** signed up for the VAMAP program under the presumption that because they were two of the most junior employees, the program would not be offered to them.

At some point, the company eliminated the layoff without pay program and replaced it with the Involuntary Management Attrition Program (IMAP). This program provided for involuntary separation from the company with a "transition payment" and would be applied to the most junior employees first.

CARTER testified that after the IMAP program was offered, Massett told them that they could change programs, but they would be subject to SILOR before IMAP and that unemployment compensation was guaranteed under the VAMAP program. Based on this information, **CARTER** chose to remain with VAMAP. Massett asked her to talk with **JACKSON** about it because she had not been interviewed for transfer and would probably be laid off. **JACKSON** asked Massett whether IMAP was the same as VAMAP because if so, she would take IMAP. According to **JACKSON**, Massett responded that it would not be wise to choose IMAP because employment was guaranteed under VAMAP and SILOR would be filled first.

JACKSON, CARTER and **ALLEN** all testified that during this period, Johansen was very nervous and distraught and called various sources to find a job. Johansen was the most junior engineer. There was also testimony that after Johansen privately met with Massett, she was quite calm. **JACKSON** testified that after she chose to remain with the VAMAP program, Johansen told her that she had saved her job.

JACKSON discovered on May 11, 1984, that she had been accepted for VAMAP. She was surprised and when she asked Massett what had happened, he told her that he did not know and guessed that the company had decided to accept everyone who applied.

Each employee was given a booklet explaining the (MTAP) programs.

Johansen testified that she was never told that only 14 people would be accepted for VAMAP and that she thought she would be accepted if she actually filled out the form.

Another Black engineer, Henry Johnson, Jr., testified that he was never told that only a certain number would be

accepted for VAMAP. He did testify, however, that he was told by management at some point that signing up for VAMAP would prevent exposure to SILOR. He chose no to sign up for VAMAP because he did not want to leave the company. He remembered talking with Johansen about VAMAP and suggesting to her that she contact someone regarding job interviews. Her response was that she was not selected for interviews because she did not have a technical degree; however, Johnson was sent on several interviews and he does not have a technical degree.

Peter Massett denied telling **CARTER** and **JACKSON** anything that would encourage them to take VAMAP.

Hershel Nisby, another Black engineer, testified that management did not give the number of persons who would be accepted under VAMAP. Nisby declined VAMAP because he was never told that signing up for VAMAP would protect him from SILOR.

E. Glenn Andrews, General Manager, District Distributing Services for Area Code 504, testified that VAMAP was offered to all employees but would have to be approved by the office in Birmingham. It was approved on a seniority basis. Of the 91 employees working out of the office in question, 13 signed up for VAMAP - Ten (10) Whit and three (3) Black.

LEMORE ALLEN became concerned about the surplus in November of 1983, when it was first discussed. Upon discussing the issue with Mike Neal, **ALLEN** was told that he was "not one of the people they were trying to get rid of." He did not think Johansen was worried, even though she was the most junior person in the division.

b. **LEMORE ALLEN**

LEMORE ALLEN was hired on November 16, 1972, as a 1-H, entry level associate engineer. He was the first Black

to be hired by the office in that position. **ALLEN** testified that he worked for four years as an associate before being promoted to full engineer whereas Whites hired after him in the company in the same position were promoted in about two years. **JACKSON** was promoted to full engineer in about two years in the Birmingham office. **MARY CARTER** was hired under the management program and, therefore, had to be promoted within two years or be terminated.

ALLEN seeks redress for alleged discrimination in transfer/promotion, evaluation and termination.

1. Transfer to Planning

ALLEN had been advised that any further promotion would require experience working with the planning group. In 1984, after the layoff, the Westbank lost one of its planners. The planner was James Burse, a Black man, who had acquired his position as Operation Manager. **ALLEN** later heard that Johansen was getting the position. Johansen was selected for the position in April, 1985. Johansen was six and one half (6-12) years junior to ALLEN. **ALLEN** filed a charge with the Equal Employment Opportunity Commission (EEOC).

ALLEN testified that he had stated in a document circulated by management that he was interested in working in the planning department. **ALLEN** had also spoken with Phil Chavers about this desire. After confirming Johansen's transfer, **ALLEN** wrote a letter saying that he was dissatisfied with how the selection was made. **ALLEN** was told that Johansen's rating helped her get the job.

2. Ratings

In the last rating period prior to her transfer, Johansen

was rated MC or major-contributor. **ALLEN** was rated SC or satisfactory contributor. **ALLEN** was rated MC in the previous evaluation.

According to Phil Chavers, **ALLEN** was reduced to SC because (1) the company established a rule that only 50% could receive a MC rating, and (2) **ALLEN** fell in the lower 50% because of his place on the rank order list. Subjective factors considered, Chavers testified, were:

(1) **ALLEN** did not get along with people, (2) **ALLEN** did not put 100% into his work and (3) **ALLEN's** drawings would not be exactly correct.

Chavers also testified that **ALLEN** had missed three deadlines. He recanted that testimony when confronted with a letter which showed that **ALLEN** missed only one deadline. The evidence showed that this project was assigned to **ALLEN** while he was on vacation.

Chavers also stated that he had received complaints about **ALLEN's** work from a customer and other employees of South Central Bell. The customer said that he did not want anything to do with **ALLEN**. Norman Gauthreaux, a White male and routine engineer, was reduced from MC to SC. It was specifically noted on his evaluation that he did not get along with other workers.

ALLEN testified that he was told by Mike Neal that Johansen was rated higher because she had given a lecture on the "CONECS" method at one of the monthly meetings. Each month an engineer was selected to discuss a subject.

ALLEN stated that he was the first to successfully use the CONECS method - use of cables that are connected - in an

underground cable that worked as planned. Yet Johansen, who at that time had not yet worked with the "CONECS" method was chosen to give the lecture at the monthly meeting.

ALLEN also testified that the amount of money in a project was a factor in rating. In discussing his evaluation with Chavers, **ALLEN** was told that he had enough jobs but not enough money to rank an MC. **ALLEN** further testified that he was also told by Mike Neal that money spent played an important part in evaluations.

The evaluation of Norman Gauthreaux contains a reference to the dollar amount of the jobs. Other documents show that the dollar value of each job was monitored.

It was brought out during the trial that the MC line was drawn at **LEMORE ALLEN**, allowing Boudreaux, a White engineer, to receive an MC rating. Lester Hopper testified that there were 40-45 engineers. **LEMORE ALLEN** was ranked 24; therefore, Boudreaux and Christofi, Numbers 22 and 23, respectively were ranked MC.

Also noted in Johansen's evaluation was that she trained Don Clark, the engineer hired after Johansen was moved to Planning.

Two estimate engineers lost their rating, **ALLEN** and Jessie Demouy, both Black. One Black engineer, Hershal Nisby, maintained his MC rating.

Johansen was also praised for "servicing" eight estimates, most of which were described as the most complex in the district. Chavers testified that "servicing" is not an engineering function. Hopper stated that reference to a project as complex was inappropriate.

Chavers criticized **ALLEN** in the 1985 evaluation for not showing more effort in routine evaluations. During the evaluation of January 1, 1986, it is undisputed that Johansen was assigned to the Planning Department for three months and that she was assigned to train a new engineer (Don Clark) for three weeks. Johansen completed 14 jobs in approximately nine months - seven jobs were large and six were small. **ALLEN** completed 31 jobs in approximately 12 months - twenty-five were small and six were large. (See Defendant's Exhibit #25.)

Mike Brickley, who worked with the construction group, testified as to the difficulty working with projects engineered by Johansen. He testified as to a particular job that had to be completely re-engineered. He testified that **ALLEN's** work had on occasion required re-engineering, however, overall, he found that **ALLEN's** work made his "job easier".

Joseph James, also of the construction group, testified that he had problems with Johansen's work.

Henry Johnson testified that he was told by Aaron Begnaud, another supervisor, White male, that both routine and estimate experience were needed for a job in Planning, particularly estimate work. Evidence showed that the majority of Johansen's work was routine engineering. Hamilton Neal testified that Johansen performed more rural work.

No announcements were made and no notices were posted that there was an opening in Planning. The Planning Department was headed by Aaron Begnaud. Begnaud stated that the Planning Department determines the budget and provides services when needed. Begnaud said that there were no promotions rendered out of the Planning Department. According to Begnaud, the requirements of a planner are:

(1) Adaptability
(2) Computer knowledge

(3) Coordination ability
(4) Saleability
(5) Knowledge of engineering
(6) Willingness to learn the job.

Begnaud also stated that anyone expressing an interest in planning was kept in mind and not in a file.

In September 1984, James Burse, a Black planner, was terminated and Begnaud needed to fill the position. Begnaud got the go-ahead from management to fill the position. Begnaud decided that Barbara Johansen was the person for the job. Begnaud stated that Black planners James Burse and Jeffers were selected in the same manner as Johansen.

Begnaud testified that he considered the following factors in selecting Johansen for the Planning Department: (1) estimate work; (2) engineering knowledge and expertise; (3) computer use; (4) urban experience; and, (5) ability to sell projects to the staff (helpful but not necessary); and (6) ability to coordinate a deal with engineers.

ALLEN was again rated SC in the January 1986 evaluation. In March of 1986, **ALLEN** filed the instant action.

3. Termination - Retaliation

ALLEN testified that projects were taken from him and given to Johansen and other engineers. **ALLEN** wrote a letter to his supervisor, Phil Chavers, outlining nine (9) areas of contention. Chavers did not address all nine inquiries. During this conversation, **ALLEN** testified that Chavers remarked "Everybody knows you filed the lawsuit".

In July of 1986, **ALLEN** was assigned a project. **ALLEN**

was scheduled for a vacation. Before leaving, **ALLEN** was allowed to transfer the project to another engineer for completion. The estimate, complete with mistakes, was issued in **ALLEN's** name. Chavers admitted at trial that he knew some of the writing was not **ALLEN's** and that the estimate had been completed by another engineer. Further, the evidence showed that the signature on the estimate was not **ALLEN's**. **ALLEN's** duties and workload were reduced.

Two reasons were given by South Central Bell as reasons for **ALLEN's** termination: (1) distributing propriety information, and (2) falsifying an auto accident report.

In August of 1986, J. Courtney Wilson, Attorney for plaintiff, deposed employees of the defendant. During questioning, Attorney Wilson referred to an estimate front sheet. Lester Hopper was present. Hopper later reported to J. J. Banquer, the security investigator, that Wilson was in possession of the document. **ALLEN** was questioned but refused to answer without consulting with his attorney. The security investigation report was sent to Glenn Andrews on September 26, 1986. **ALLEN** later stated that he thought the documents had been subpoenaed by his attorney. Glenn Andrews testified that he determined that **ALLEN** should be terminated after consulting with the Legal Division of the Personnel Department.

Evidence showed that the documents were not marked proprietary and there was testimony that such documents could be retrieved from trash cans in the office. South Central Bell Executive instructions state that all "proprietary" documents should be so marked. Employee instructions state that employees are not to divulge to any unauthorized person any proprietary information of the company, including documents affiliated or associated with the Bell Company. Evidence was also introduced of 14 employees who has used proprietary information to obtain

prizes from Radio Station "B-97". Twelve (12) of the employees were white and two (2) Black. The two Black employees denied any wrongdoing. The White employees admitted the scam and were suspended for four weeks. It was not stated whether the proprietary information was marked as such. All the employees reportedly cooperated in the security investigation.

On September 26, 1986, while performing duties of his employment, **ALLEN** drove his company's vehicle over a street curb sustaining damage to said vehicle. **ALLEN** testified that when he relayed the circumstances to a manager, he was told to treat it as a flat tire. There was no contradictory testimony. **ALLEN** filed a report as required, stating what occurred.

On October 2, 1986, Phil Chavers told **ALLEN** that he would have to write a full report for an Accident Investigation Committee meeting. Company management later determined that **ALLEN** should be terminated for filing a false accident report.

On October 16, 1986, attorney for defendant, Charles Rivet sent a memorandum to Andrews stating

> "I think it's time we go on the offensive re Wilson's possession of proprietary information, etc."

ALLEN was terminated on October 21, 1987.

Evidence also was introduced of an accident involving two South Central Bell employees, Don Clark, a White male, and Rudy Courseault, a Black male, where they were cited for filing a false report relative to an accident in a company truck. When confronted with the incident, it was determined that Don Clark had falsified the report. He was disciplined by being placed on a period of unpaid leave and transferred to another department.

4. Pattern And Practice

There was much testimony that the South Central Bell supervisors did not like Blacks and did not want Blacks to work for the company, Herb Lietz, a former district manager of Cable Maintenance on the Westbank, testified that the Tchoupitoulas Work Center was called "Little Africa" and "Zulu Land" by the White SCB employees because a number of Blacks were employed at the Center. Lietz last worked at SCB in 1981. Lietz also testified that SCB operated under a consent order under Equal Employment Opportunity Commission (EEOC) guidelines, which provided for filling minority quotas. According to Lietz, management, including Lester Hopper, avoided meeting the quotas and promoting Blacks by appointing a White male to "relieve" for a job until a White male slot was available and that Les Hopper was fully aware of this. Lietz testified "we all made remarks" such as "Everybody's got to have a nigger".

Lietz also stated that Hopper was aware that Black and White slots were traded between the managers. He also stated that minorities were not promoted because they were not qualified or because they did not want to promote qualified minorities. Lietz claimed that every qualified Black was promoted.

Keith Francis, a Black, former manager for SCB, testified that racism was rampant in the SCB Company. When his department was top-rated, he was called the "great Black hope" rather than a good manager. He was referred to on occasion in racist terms particularly by Hopper, who on more than on occasion made racial remarks in references to positions and promotions in 1982. E.g., "Everybody's got to have a nigger." Francis left SCB via VAMAP in 1985, thereby receiving $17,000.00. Although Francis reportedly received an outstanding rating and a promotion under Hopper, Francis stated that he left SCB because of the racial slurs and his interest in his

part-time business. Additionally, Francis stated that he did not file charges with the EEOC, and that he did not file a complaint with SCB concerning the racial slurs.

Hamilton M. Neal, Jr., a White, former SCB manager of outside planning engineering, also testified that he has heard Pete Massett make a racial comment.

CONCLUSIONS OF LAW

A plaintiff bears the burden of proof in an employment discrimination case. First, plaintiff must establish a prima facie case of discrimination. A prima facie case is evidence of facts from which one can "infer discriminatory animus because experience has proved that in the absence of any other explanation, it is more likely that not those actions were bottomed on impermissible considerations." Furnco Construction Corporation v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 2951, 51 L.Ed.2d 957 (1978).

The burden then becomes that of the defendant to present some legitimate non-discriminatory reason for the action in question. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). This is a burden of production, not persuasion.

This rebuts the presumption of intentional discrimination. The plaintiff must then show that the reasons proffered are mere pretext. The burden of persuasion remains with the plaintiff. The ultimate question is whether the defendant intentionally discriminated against the plaintiff. Once the court accepts evidence of a legitimate, nondiscriminatory reason for the apparent disparate treatment, the question for the court is whether plaintiff met his ultimate burden of proving discrimination. See United States Postal Service Board of Governors v.

Aikens, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). The plaintiff can establish intentional discrimination by directly persuading the court that a discriminatory reason more than likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Bohrer v. Hanes Corp., 715 F.2d 213, 218 (5th Cir. 1983), cert. denied, __ U.S. __, 104 S.Ct. 1284, 79 L.Ed.2d 687 (1984); Ratliff v. Governor's Highway Safety Program, 791 F.2d 394, 400 (5th Cir. 1986) (citing Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981)). See also Kendall v. Block, 821 F.2d 1142, 1146 (5th Cir. 1987).

In McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the court held that to establish a prima facie case, the plaintiff must show (1) that he belongs to a racial minority, (2) that he applied and was qualified for a job for which the employer was seeking applications, (3) that, despite his qualifications, he was rejected, and (4) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

This, however, was "Never intended to be rigid, mechanical, or ritualistic". Furnco, 438 U.S. at 577, 98 S.Ct. at 2949.

1. **CARTER and JACKSON - Layoffs**

From the facts presented at trial, this court cannot find that unlawful discrimination was the reason for the layoff of **CARTER** and **JACKSON.** The preponderance of the evidence showed that **CARTER** and **JACKSON** strategically, but voluntarily, chose and maintained the VAMAP option as a means of protecting themselves from transfer or IMAP. Unfortunately, a company decision resulted in their layoff.

The preponderance of evidence also showed that **CARTER** and **JACKSON** were given the same information about the MTAP program that was given to all other employees, including **ALLEN** and Nisby, both of whom chose not to sign up for the VAMAP program.

CARTER and **JACKSON** cannot prevail on their claims.

2. **ALLEN** - Transfer and Evaluation
(Planning Department)

> In order to establish prima facie case of race discrimination in context of failure to promote, a plaintiff must show that he belongs to protected group, that he was qualified for an applied for promotion, that he was considered for and denied the selection, and that similarly qualified employees from outside plaintiff's protected group was selected at time that plaintiff was rejected. -Bennett v. Texas Bd. of Pardons and Paroles, 670 F.Supp. 196 (E.D. Tex. 1987).

ALLEN was available for the position. Evidence showed that the company was aware that **ALLEN** wanted an opportunity to work in the Planning Department. He was presumptively qualified and he was rejected.

The reasons South Central Bell offers for its failure to choose **ALLEN** for the position are worthy of credence.

In the evaluations dated January 1, 1985 and January 1, 1986, **ALLEN** was rated as a satisfactory contributor (SC). In the evaluation of July 1, 1984, **ALLEN** had been rated a "major contributor" (MC). **ALLEN** contends that the SC ratings were assigned to him because of his race and that he performed

equally, as well or better than a White employee, Barbara Johansen, who received "MC" on both evaluations dated January 1, 1985 and 1986. Phil Chavers, **ALLEN's** Supervisor, explained how **ALLEN's** 1984 rating had been upgraded from SC to MC. Chavers also explained why **ALLEN** received SC rating for the 1985 and 1986 evaluations. Chavers supervised 3 Black and 5 White engineers.

Both **ALLEN** and Johansen had about the same objective criteria comparison rating. (See Appendixes A and B.) The subjective criteria considered at the ranking meetings made the difference.

The use of subjective criteria in evaluating employees does not, standing along, establish racial discrimination nor does it require the evaluation be set aside. Page v. U.S. Industries, Inc., 726 F.2d 1038, 1046 (5th Cir. 1984).

Chavers also stated that "we looked at the person who could put work out for less money".

Aaron Begnaud's, Supervisor of the Planning Department, explanation of selecting Johansen for the planning job instead of **ALLEN** is not pretextual and said selection does not amount to intentional racial discrimination. Numerous White employees in the Westbank district, who had previously rated MC, were also rated SC during the same periods as **ALLEN**. For example, Norman Gautreaux appears to have performed comparably to than **ALLEN** in the evaluation of 1986. However, Gautreaux received SC ratings because of the same subjective criteria applied to **ALLEN.**

In Barnes v. Yellow Freight Systems, Inc., 778 F.2d 1096, 1101 (5th Cir. 1985), the Court of Appeals stated the following when it vacated and remanded the district court's entry

of judgment in favor of Yellow Freight Systems, Inc., for determination of whether Barnes had received more severe treatment because of his race. ...a court faced with a disparate treatment Title VII case such as this one must often look behind an employer's words and ask probing questions about the practices about the workplace, seeking out an attempting to resolve any inconsistencies in the manner of dealing with the employees in question. We should not be satisfied with anything less than a probing analysis of the facts, if two (2) people of different races, similarly situated, receive different treatment from their employer. (After remand, the district court found no racial discrimination. The decision was affirmed in Barnes v. Yellow Freight Systems, 830 F.2d 61 (5th Cir. 1987)).

During the period covered by the evaluation of January 1, 1986, **ALLEN's** quality of work was less than that of Johansen and in two instances, was less than that of other White employees who were also rated SC. During the evaluations of January 1, 1985 and 1986, Hershel Nisby, a Black co-worker of **ALLEN's**, received an MC rating from the same White supervi sor who rated **ALLEN.**

The reasons proffered for evaluating **ALLEN** SC and for not transferring **ALLEN** to the Planning Department are not pretextual. The defendant has presented legitimate non-discriminatory reasons for its action. Plaintiff has not proved that the defendant intentionally discriminated against him regarding rating and transfer/promotion to the Planning Department.

3. **ALLEN - Retaliation**

To establish a prima facie case of retaliation, **ALLEN** must show (1) that he engaged in a protected activity, (2) adverse employment action followed, and (3) the adverse action was linked to the protected activity. Goff v. Continental Oil Co., 678 F.2d 593 (5th Cir. 1982).

ALLEN filed a complaint with the Equal Employment Opportunity Commission. Thereafter, his job duties were reduced and eventually he was fired.

On October 21, 1986, **ALLEN** was terminated from his employment from SCB. **ALLEN** contends that his discharge was prompted by intentional racial discrimination on account of his filing a lawsuit against the defendants.

The decision to terminate **ALLEN** was made by Glenn Andrews, General Manager. The defendant had sufficient information to form a reasonable basis on which to believe that the documentation containing propriety information was given without authorization by **ALLEN** to his counsel for possible use against the defendant in pending litigation. The subject documents contained proprietary information which **ALLEN** had acknowledged was not to be made available to unauthorized persons. (See Defendant Exhibits 19, 15, 14.). Said conduct amounts to a violation of SCB's rules and regulations.

Additionally, **ALLEN** refused to cooperate in the SCB's security investigation without first conferring with counsel. **ALLEN** was advised that if he refused to cooperate, that further action could be taken based on available information.

ALLEN's violation of company rules and regulations and his refusal to cooperate with the security investigation provided a legitimate and an appropriate basis upon which to impose the discipline of termination. There is no evidence that White employees, having engaged in similar conduct were treated in a less severe manner.

Thus, **ALLEN's** retaliation claim must fail.

Accordingly, IT IS ORDERED that Judgment be entered in favor of South Central Bell Telephone Company and against **MARY H. CARTER, TAHNELLA JACKSON,** and **LEMORE ALLEN,**

DISMISSING the Complaints and Amended Complaints in this consolidated matter.

New Orleans, Louisiana, this 30th day of September, 1988.

\s\ Louis Moore, Jr.
LOUIS MOORE, JR.
United States Magistrate

APPENDIX "A"

DEFENDANT EXHIBIT #24

EVALUATION OF JANUARY 1, 1985
COVERING PERIOD
JULY 1, 1984 - DECEMBER 31, 1984

JOBS

	Small	Large	Total
Lemore Allen	6	5	11
Barbara Johansen	12	1	13
Lloyd Massey	50	5	55
Don Clark	13	5	18
Norman Gauthreaux	31	12	43
Richard Cernich	10	4	14

ESTIMATES AND COMPLEXITY

Lemore Allen 14	2 Est. Submitted	8 Simple
	6 Sets of Drawings Issued	6 Complex
	7 Est. Serviced	0 Extremely Complex
Barbara Johansen .. 9	1 Est. Submitted	4 Simple
	1 Set of Drawings Issued	2 Complex
	8 Est. Serviced	3 Extremely Complex

Lloyd Massey.....0
Don Clark.....0
Norman Gauthreaux....0
Richard Cernich 0

COMMITMENTS

Lemore Allen	96% Met or Exceeded; 4% Missed
Barbara Johansen	96% Met or Exceeded; 4 % Missed
Lloyd Massey	88% Met or Exceeded; 4% Missed
Don Clark	92% Met or Exceeded; 8% Missed
Norman Gauthreaux	95% Met or Exceeded; 5% Missed
Richard Cernich	95% Met or Exceeded; 5% Missed

SCHEDULE OF ESTIMATES

Lemore Allen	No Misses
Barbara Johansen	No Misses

SAFETY

Lemore Allen	No Accidents
Barbara Johansen	No Accidents
Lloyd Massey	1 Accident
Don Clark	0 Accidents
Norman Gauthreaux	0 Accidents
Richard Cernich	0 Accidents

QUALITY

Lemore Allen	Met Quality Commitment
Barbara Johansen	Met Quality Commitment
Lloyd Massey	1.0 (1.2 or less acceptable)
Don Clark	Not Rated
Norman Gauthreaux	1.0 (1.2 or less acceptable)
Richard Cernich	1.0 (1.2 or less acceptable)

APPENDIX "B"

DEFENDANT EXHIBIT #25

EVALUATION OF JANUARY 1, 1986
COVERING PERIOD
JANUARY 1, 1985 - DECEMBER 31, 1985

JOBS

	Small	Large	Total	
Lemore Allen	25	6	31	
Barbara Johansen	7	7	14	*
Lloyd Massey	64	19	83	
Don Clark	44	11	55	
Norman Gauthreaux	55	16	71	
Richard Cernich	39	13	52	

ESTIMATES AND COMPLEXITY

Lemore Allen 15	5 Est. Submitted	9 Simple
	4 Sets of Drawings Issued	5 Complex
	12 Est. Serviced	0 Extremely Complex
Barbara Johansen .. 12	*0 Est. Submitted	0 Simple
	4 Sets of Drawings Issued	3 Complex
	12 Est. Serviced	2 Extremely Complex
Lloyd Massey 1	1 Est. Submitted	Extremely Complex
	1 Set of Drawings Issued	
	1 Estimate Serviced	

Don Clark 1	1 Estimate Submitted 1 Set of Drawings Issued 1 Estimate Serviced	Complex

Norman Gauthreaux .. 0
Richard Cernich 0

COMMITMENTS

Lemore Allen	88% Met or Exceeded, 12% Missed
Barbara Johansen	88% Met or Exceeded, 12% Missed
Lloyd Massey	76% Met or Exceeded, 24% Missed
Don Clark	76% Met or Exceeded, 24% Missed
Norman Gauthreaux	86.4% Met or Exceeded, 13.6% Missed
Richard Cernich	86.4% Met or Exceeded, 13.6% Missed

SCHEDULE OF ESTIMATES

Lemore Allen	No Misses
Barbara Johansen	No Misses
Lloyd Massey	No Misses
Don Clark	No Misses

SAFETY
NO ACCIDENT FOR ANY OF THE
NAMED EMPLOYEES

QUALITY (85 OR ABOVE ACCEPTABLE)
LAST TWO QUARTERS

	3rd Qtr.	4th Qtr.	Av. for Year
Lemore Allen	84.4	97.7	87.4
Barbara Johansen	96.3	98.0	97.6
Lloyd Massey	81.0	77.0	80.0
Don Clark	86.0	88.0	88.0
Norman Gauthreaux	98.1	99.3	98.0
Richard Cernich	80.6	92.9	87.0